Batu Malay a/l Thandy v Sures a/l Subramaniam & Ors

A

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–500–03 OF 2014
BALIA YUSOF, MOHAMAD ARIFF AND ABANG ISKANDAR JJCA
13 JANUARY 2015

B

Legal Profession — Disciplinary committee — Findings — Advocate and solicitor found guilty of deducting loan sums from damages awarded for benefit of third party lenders — Advocate and solicitor requested to appear disciplinary board and make representations — Advocate and solicitor failed to be present on any of given dates — Disciplinary board proceeded to make order for payment of penalty of RM50,000 to discipline fund within one month and in default, suspension from practice until payment of penalty — Legal Profession Act 1976 s 103D — Appeal against decision of disciplinary board

C

D

The appellant, an advocate and solicitor, appealed against the order of the High Court which dismissed his appeal to the High Court against the order of the disciplinary board ('DB') made pursuant to s 103D of the Legal Profession Act 1976 ('the Act'). The appellant had deducted loan sums from the damages awarded for the benefit of third party lenders. After investigating the complaint lodged against the appellant, the disciplinary committee ('DC') came to the finding that the respondent had compromised his position as an advocate and solicitor by extending/arranging loans to his client and further holding back settlement sums due to his client to recover monies lent by third parties to his client. The DB wrote to the appellant to inform him of this and requested him to appear before the DB and make his representations before the DB made any order. Three chances were given to the appellant to be present before the DB but the appellant failed to be present on any of the given dates. The DB then proceeded to make an order under s 103D of the Act that the appellant pay a penalty of RM50,000 to the discipline fund within one month and in default thereof, the appellant shall be suspended from practice until payment of the penalty. Aggrieved by the decision of the DB, the appellant filed an appeal to the High Court. The appeal was dismissed by the High Court judge with no order on costs. Hence, the present appeal. The appellant submitted that his absence at the hearing of the DB was because he had migrated to Canada.

E

F

G

H

Held, dismissing the appeal with no order as to cost:

I

(1) There were no merits in the appellant's arguments and the grounds advanced by appellant touched on a well-trodden area, where case authorities have made it very clear that in matters involving the discipline of the legal profession, it is best for the affected advocate and solicitor to

be judged by his own peers through the statutory mechanisms mandated by the Act. The court can interfere but only in rare and exceptional cases. The High Court was right to decide as it did, and there was no reason to disturb the findings and decision (see paras 3 & 14).

(2) There was no one else to be blamed for his predicament except the appellant himself. The reason for his absence was a lame and unconvincing. The appellant submitted that there was 'no shred of evidence' that his client had lent money on interest or was in the business of money lending. The appellant even suggested that there was nothing wrong for a loan to be given to a needful client in the course of pursuing a case. It was quite alarming to hear this sort of arrangement was nothing out of the ordinary (see para 15).

[Bahasa Malaysia summary

Perayu, peguambela dan peguamcara, merayu terhadap perintah Mahkamah Tinggi yang mana menolak rayuannya kepada Mahkamah Tinggi terhadap perintah lembaga tatatertib ('LT') yang dibuat berikutan s 103D Akta Profesion Undang-Undang 1976 ('Akta'). Perayu telah menolak jumlah pinjaman daripada ganti rugi yang diawardkan bagi faedah peminjam pihak ketiga. Selepas menyiasat aduan yang dibuat terhadap perayu, jawatankuasa tatatertib ('JT') mendapati bahawa responden telah memkrompomi kedudukannya sebagai peguambela dan peguamcara dengan melanjutkan/mengatur pinjaman kepada anak guamannya dan selanjutnya memegang jumlah penyelesaian yang kena dibayar kepada anak guamannya untuk mendapatkan semula wang yang dipinjamkan oleh pihak ketiga kepada anak guamnya. LT menulis kepada perayu untuk memaklumkan mengenai perkara ini dan meminta dia untuk hadir di hadapan LT dan membuat representasinya sebelum LT membuat apa-apa perintah. Tiga peluang diberikan kepada perayu untuk hadir di hadapan LT tetapi perayu gagal untuk hadir pada mana-mana tarikh yang diberikan. LT kemudiannya meneruskan untuk membuat perintah di bawah s 103D Akta bahawa perayu membayar penalti sebanyak RM50,000 kepada dana tatatertib dalam tempoh sebulan dan jika ingkar, perayu akan digantung daripada amalan sehingga membayar penalti tersebut. Tidak berpuas hati dengan keputusan LT tersebut, perayu memfailkan rayuan kepada Mahkamah Tinggi. Rayuan ditolak oleh hakim Mahkamah Tinggi tanpa perintah ke atas kos. Maka, rayuan ini. Perayu berhujah bahawa ketidakhadirannya pada pendengaran LT adalah kerana dia telah berhijrah ke Kanada.

Diputuskan, menolak rayuan tanpa perintah untuk kos:

(1) Tidak terdapat merit dalam penghujahan perayu dan alasan yang dikemukakan oleh perayu menyentuh ke atas bahagian yang selalu dilalui, di mana kes autoriti telah menunjukkan dengan jelas bahawa dalam perkara yang melibatkan tatatertib profesion undang-undang, ia

adalah yang terbaik bagi peguambela dan peguamcara dihakimi oleh rakan-rakannya sendiri melalui mekanisme statutori yang dimandatkan oleh Akta. Mahkamah boleh campur tangan tetapi hanya dalam kes-kes yang jarang berlaku dan luar biasa. Mahkamah Tinggi adalah betul untuk memutuskan seperti yang ia putuskan, dan tiada sebab untuk campur tangan dapatan dan keputusan tersebut (lihat perenggan 3 & 14).

(2) Tiada siapa lagi yang boleh dipersalahkan untuk keadaan kesusahan kecuali perayu sendiri. Alasan untuk ketidakhadirannya adalah lemah dan tidak meyakinkan. Perayu berhujah bahawa 'no shred of evidence' yang anak guamnya telah meminjamkan wang atas faedah atau dalam perniagaan memberi pinjaman wang. Perayu juga mencadangkan bahawa tidak salah untuk pinjaman diberikan kepada anak guam dalam perjalanan untuk memburu kes. Ia agak membimbangkan untuk mendengar bahawa penyusunan seperti ini bukan yang luar biasa (lihat perenggan 15).]

Notes

For cases on findings of disciplinary committee, see 9 *Mallal's Digest* (5th Ed, 2015) paras 1520–1521.

Cases referred to

Gana Muthusamy v LM Ong & Co [1998] 3 MLJ 341, CA (refd)

Legislation referred to

Legal Profession Act 1976 s 103D

Appeal from: Originating Summons No 17–9–03 of 2013 (High Court, Kuala Lumpur)

D Kalai (Kalai & Partners) for the appellant.
Heng Yee Kiat (Christopher Joseph & Assoc) for the respondents.

Mohamad Ariff JCA:

[1] The appellant, an Advocate and Solicitor of the High Court of Malaya, appealed against the order of the High Court dated 25 February 2014 which dismissed his appeal to the High Court against the order of the disciplinary board ('DB') dated 18 January 2013 made pursuant to s 103D of the Legal Profession Act 1976 ('the Act'), reading:

(1) After consideration of the report of the Disciplinary Committee, the Disciplinary Board may make an order —

(a) affirming the recommendations of the Disciplinary Committee; and

(b) may either accept the recommendations of the Disciplinary Committee of the punishment to be imposed or, in exceptional cases, impose a greater punishment.

(2) Before the Disciplinary Board makes an order and imposes a punishment under this section which results in a greater punishment, it shall notify the advocate and solicitor concerned of its intention to do so and give him a reasonable opportunity to be heard.

(3) Where the Disciplinary Board does not agree with the recommendations of the Disciplinary Committee, the Disciplinary Board shall make such order as it deems just.

[2] On the facts of this appeal, the disciplinary board agreed with the recommendations of the disciplinary committee ('DC') on liability but differed from it on the question of punishment. The DC had recommended a punishment of suspension from practice for a period of two months. The DB's order was for the appellant to pay a penalty of RM50,000 to the discipline fund within one month, failing which the appellant would be suspended from practice until payment of the penalty.

[3] We unanimously dismissed the appeal, finding it to be without merits and the grounds advanced by the appellant's counsel touched on a well-trodden area, where case authorities have made it very clear that in matters involving the discipline of the legal profession, it is best for the affected advocate and solicitor to be judged by his own peers through the statutory mechanisms mandated by the Act. The court can interfere but only in rare and exceptional cases, as stated by this Court of Appeal, for instance, in *Gana Muthusamy v LM Ong & Co* [1998] 3 MLJ 341:

> It is primarily for members of the Bar to decide what amounts to conduct unbecoming of an advocate and solicitor in particular circumstances, according to standards established by members of that honourable profession. Courts must necessarily exercise caution when entertaining an appeal in which the central question is whether particular conduct is unprofessional and cases meriting curial interference will be rare. Otherwise it will be the court and not the profession that will determine the yardstick of professional behaviour (at pp 344–345).

[4] As for the background facts, the first and second respondents had lodged a complaint to the DB against the appellant, alleging that the appellant had only given them RM1,000 as the payment of damages out of RM65,000 which was awarded, being the settlement sum from the insurance company arising from an accident case involving the first and second respondents. It was also alleged that the sum of RM1,000 was only released by the appellant after deducting all the loans taken by the first and second respondents from the appellant. The first and second respondents feeling cheated, thus lodged a complaint with the DB on 14 May 2009. The DB wrote to the appellant to

request for his written explanation which he provided on 26 August 2009. The written explanation from the appellant was then forwarded to the first and second respondents. The first respondent's comments were received on 24 September 2009, and thereafter the DB appointed the DC to investigate the complaint.

[5] The complaint was heard by the DC on 26 August 2010 and 14 August 2011. The appellant and the first respondent were present at the hearing. The second respondent/complainant had withdrawn her complaint at the commencement of the hearing.

[6] After investigating the complaint, the DC came to the following finding:

> It is the finding of the Disciplinary Committee that the Respondent has compromised his position as an Advocate and Solicitor by extending/arranging loans to his client and further holding back settlement sums due to his client to recover monies lent by third parties to his client. (See p 190, Appeal Record).

[7] The DC found the following facts established:

1. The Complainant admitted that he had financial problems and he took loans from the Respondent. He confirmed receiving cheques for total sum of RM24,500.00. He further stated that he received in cash a lower sum than what was signed by him. He was not sure the exact sum that he received.

2. The Respondent asserted that a friendly loan of RM24,500.00 in cheques and RM24,050.00 in cash totalling RM48,550.00 was given to the Complainant ... The legal fees and disbursements owed by the Complainant was RM15,000.00, leaving a balance due to the Complainant a sum of RM1,450.00. During the course of hearing the Respondent admitted that the loans under cheques for RM20,500 was issued by one Thilagawathi Simanchalam, a cheque from RM4,000.00 by one Subbuletchumi Simanchalam and cash sums for RM18,050.00 was issued by Malliga Simanchalam. Only one payment for RM6,000.00 in cash was said to be received by the Complainant from the office of the Respondent on 7th March 2008.

[8] The appellant was found liable for compromising his position as an advocate and solicitor in the manner stated earlier and the DC recommended that he be suspended for a period of two months.

[9] However, the disciplinary board disagreed with the disciplinary committee's recommendation on the punishment to be imposed on the appellant. The DB wrote to the appellant to inform him of this and requested him to appear before the DB and make his representations to the DB on 3 November 2012 before the DB made any order. On the evidence, three

chances were given to the appellant to be present before the DB to make his representation on 3 November 2012, 8 December 2012 and 18 January 2013 but the appellant failed to be present on any of the given dates.

[10] The meeting of the DB on 18 January 2003 was preceded by a letter dated 26 December 2012 sent to the appellant in which the appellant was informed that he was to appear on 18 January 2013, with a warning that if he did not, the DB would proceed to consider the complaint in his absence.

[11] The appellant was again absent on 18 January 2013. The DB then proceeded to consider the complaint and the report of the DC in his absence and made an order under s 103D of the Act that the appellant pay a penalty of RM50,000 to the discipline fund within one month and in default thereof, the appellant shall be suspended from practice until payment of the penalty.

[12] Aggrieved by the decision of the DB, the appellant filed an appeal to the High Court. Nevertheless, as we indicated earlier, that appeal was dismissed by the learned High Court judge with no order on costs, however.

[13] The High Court, in explaining the dismissal of the appeal, held:

> ... from the facts, it is clear that the appellant had been absent from the purported enquiry of the disciplinary board although he had been informed and also although the enquiry had been postponed many times to enable him to be present. In my view, whether the appellant had a good defence or not, that should have been presented before the disciplinary board, before the disciplinary board made its order under s 103D of the Act 166. The appellant had failed to do so and thereof (sic) he cannot now come and complain to this court. He was the one who chose to be absent and therefore this court would not interfere with the decision of the disciplinary board ...
>
> Although it was alleged that the complainant had withdrawn his complaint against the appellant, that fact was not a bar to a disciplinary action and it was also not a defence. Refer to the decision of the Federal Court in *Datuk M Kayveas & Anor v Bar Council* [2013] 5 MLJ 640.
>
> It is only in rare and exceptional circumstances that a court should interfere with the disciplinary board's discretion and the court must exercise caution when entertaining an appeal of this nature, as the Disciplinary Board knows better ... (pp 3–4 of the High Court judgment).

[14] The High Court was right to decide as it did, and we saw no reason to disturb the findings and decision.

[15] During the hearing of the appeal before us, counsel for the appellant attempted to explain his client's absence at the hearing of the DB despite the

reminders sent, by simply arguing his client had migrated to Canada. With respect, we found this reason to be more a lame excuse and unconvincing. Counsel further argued that there was 'no shred of evidence' that his client had lent money on interest or was in the business of money lending. In response to our promptings, counsel even suggested that there was nothing wrong for a loan to be given to a needful client in the course of pursuing a case. On the facts of this case, the appellant was in fact deducting loan sums from the damages awarded for the benefit of third party lenders. It is quite alarming to hear this sort of arrangement is nothing out of the ordinary.

[16] For the DB, counsel argued that it was for the DB to decide on misconduct and no specific rule was mentioned by it in coming to its decision, to be met with the response from appellant's counsel that no reasonable tribunal would have come to that decision.

[17] Having heard both parties (the appellant and the DB, the other respondents not appearing in this appeal), we found the appeal to be without merits and thus dismissed it, but, like the High Court, we made no order on costs. This appeal did not come within the exception of a rare and exceptional case warranting the court to interfere with the decision of the DB. On the facts, there was no one else to be blamed for his predicament except the appellant himself.

Appeal dismissed with no order as to costs.

Reported by Afiq Mohamad Noor